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COURT OF CRIMINAL APPEALS
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In the
Texas Court of Criminal Appeals
At Austin

FILED
COURT OF CRIMINAL APPEALS
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No. 01 – 18 – 00317 – CR
In the Court of Appeals for the
First Court of Appeals
At Houston

WILBER ULISES MOLINA
Appellant

v.

THE STATE OF TEXAS
Appellee

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INDENTIFICATION OF JUDGE, PARTIES, AND COUNSEL

Appellant hereby certifies that the following parties are the Judges, parties, and counsel associated with this petition.

Appellee:	THE STATE OF TEXAS
Counsel for State:	CHRIS HANDLEY WILLIAM COWARDIN
Appellant or Criminal Defendant:	WILBER ULISES MOLINA
Counsel at Trial:	MARIO MADRID
Counsel on Appeal:	JUAN M. CONTRERAS, JR. DEREK H. DEYON
Trial Judge:	HON. RAMONA FRANKLIN
First Court Of Appeals Justices:	CHIEF JUSTICE RADACK AND JUSTICES GOODMAN AND COUNTISS

/s/*Derek H. Deyon*

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DEREK H. DEYON

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TO THE HONORABLE COURT OF CRIMINAL APPEALS OF TEXAS:

STATEMENT REGARDING ORAL ARGUMENT

No oral argument is requested because this court's decisional process can be accomplished on the brief's alone.

STATEMENT OF THE CASE

On February 27, 2000, Tiffany Trosclair, complainant, visited Houston with her friends for the rodeo. In the early morning hours of their first night, Ms. Trosclair and her friends drove to a local restaurant to use the restroom. As they left the restaurant, they were approached by an individual in the parking lot, who asked for a cigarette. The same man then pulled a gun on complainant and forced her into her car as other males appeared and also entered complainant's car. The complainant's friends quickly exited the vehicle and ran away to escape, leaving complainant behind. The men then trapped complainant inside the vehicle, placed her in the backseat, and drove away.

The individuals spoke Spanish to each other. The individual in the backseat told complainant to remove her jewelry. The individual in the back seat then demanded oral sex. The individual in the backseat then forced Ms. Trosclair to perform oral sex on him. He also started pulling off complainant's pants and began to engage in sexual intercourse with complainant before the driver told him to stop.

Later, the complainant could hear another car pull up with more individuals. The driver of the other car was anxious to remove the tires and rims from complainant's vehicle. Complainant told the driver to leave her and take the car but he said he only wanted the wheels. The individual in the back seat then placed a gun against complainant's leg.

Ms. Trosclair then heard the car door open and she was pulled out of the car by one of the individuals and told to get on her knees. One individual began to remove her clothes while another demanded oral sex. Another began to simultaneously engage in sexual intercourse with the complainant. They then started to change places. The driver was working on removing the wheels from her car.

Her clothes were never completely removed. The individual from the backseat of the car had ejaculated during the oral sex. They did not try to clean her up nor remove any semen from her clothing. Once the driver had removed her wheels from the car he was ready to leave. She believed there were at least three different individuals who sexually assaulted her during the evening.

The driver then instructed her not to remove her blindfold until they were gone and she couldn't hear the other car any longer. After a while she finally heard the other car drive away. She then removed the blindfold and saw that she

was in a soccer field. Ms. Trosclair began searching for a phone to call the police.

The police arrived and took complainant to the hospital. Ms. Trosclair was immediately taken to a room and a nurse explained that they were going to do a "rape kit". The nurse took complainant's clothing and complainant eventually left the hospital in scrubs along with her parents. Ms. Trosclair was never able to get a good look at any of the individuals in the vehicle and therefore was unable to identify any of the suspects at any time nor in any way whatsoever.

Years later, Appellant was prosecuted for aggravated sexual assault based solely on the DNA profile created in the Reliagene laboratory, however, Appellant was never permitted an opportunity to confront or cross – examine any of the analysts from Reliagene who produced the only evidence which incriminated him in this offense during trial. The State instead chose to present that evidence to the jury through the testimony of Dr. Lloyd Halsell, a witness with no actual knowledge of how that evidence was created and thus cleverly shielded such evidence from any possible attack by the defense. In doing so, the State deprived Appellant of his constitutionally guaranteed right to confront his accusers. A jury later found Appellant guilty and Appellant was sentenced to 55 years in prison.

STATEMENT OF PROCEDURAL HISTORY

On August 29, 2019, the First Court of Appeals affirmed Appellant's 55 year conviction for aggravated sexual assault in Trial Court Cause No. 1433542 in the 338th Judicial District Court of Harris County, Texas. Chief Justice Radak and Justice Goodman issued a majority opinion while Justice Countiss issued a dissenting opinion. On October 10, 2019, Appellant filed a Pro Se Motion for Extension of Time to File Petition for Discretionary Review. This honorable court granted Appellant's motion and set December 2, 2019 as the deadline for Appellant to file Appellant's Petition for Discretionary Review.

On December 17, 2019, Appellant, through counsel, filed an Unopposed Second Motion for Extension of Time. This court granted Appellant's motion and extended the time for Appellant to file Appellant's petition until January 22, 2020. On January 22, 2020, Appellant filed Appellant's Petition for Discretionary Review. The court struck Appellant's petition for pleading defects and gave Appellant 72 hours to correct the defects. On January 30, 2020, Appellant filed an Unopposed Third Motion for Extension of Time simultaneously with this corrected Petition for Discretionary Review.

QUESTION PRESENTED FOR REVIEW

I. Whether the majority opinion conflicts with *Burch v. State*, when the majority opinion affirmed the trial court's admission of DNA testimony over Appellant's Confrontation Clause objection?

REASONS FOR REVIEW

Pursuant to Rule 66.3 of the Texas Rules of Appellate Procedure, Appellant seeks review because the First Court of Appeals decided an important question of state or federal law in a way that conflicts with the applicable decisions of the Court of Criminal Appeals or the Supreme Court of the United States.

ARGUMENT IN SUPPORT OF REASONS FOR REVIEW

In *Burch v. State*, the Texas Court of Criminal Appeals held that the admission of a laboratory report and the reviewing analyst's testimony violated the criminal defendant's right to confrontation. 401 S.W.3d 634, 637 – 38 (Tex. Crim. App. 2013). ("Without having the testimony of the analyst who actually performed the tests, or at least one who observed their execution, the defendant has no way to explore the types of corruption and missteps the Confrontation Clause was designed to protect against.").

Here, the Majority agreed that the trial court properly excluded the Reliagene report. The Majority, however, affirmed the trial court's admission of Dr. Halsell's testimony, which was based on the excluded Reliagene report. The Majority then held that the computer – generated DNA data from the Reliagene report is not testimonial, and the Confrontation Clause thus does not bar a testifying expert from relying on it even though the persons who accumulated the data do not take the stand and are not subject to cross – examination.

However, Dr. Halsell rendered an expert opinion using raw computer – generated DNA data and also testified directly from the excluded Reliagene report. The Dissent argued that the trial court excluded Reliagene's "Forensic Test Results"

report but it allowed Dr. Halsell to testify about all of the DNA evidence, including data and analysis from the excluded Reliagene's "Forensic Test Results" report. The Dissent then correctly concluded that Dr. Halsell's DNA testimony violated the Confrontation Clause.

Dr. Halsell possessed no personal knowledge about any aspect of Reliagene or personal knowledge concerning the company's processes and procedures. Dr. Halsell's testimony concerning the contents of the excluded Reliagene report only circumvented Applicant's constitutional right of confrontation. In short, it was pointless to exclude the Reliagene report on confrontation grounds when Dr. Halsell could simply present the contents of the excluded report to the jury without giving Applicant the right to confront any witness that actually prepared the report or had personal knowledge concerning the report.

PRAYER FOR RELIEF

Appellant prays that this honorable court reverse the majority opinion issued by the First Court of Appeals of Texas and order that this case be remanded back to trial court with the exclusion of the Dr. Halsell's DNA testimony based on the excluded Reliagene report.

RESPECTFULLY SUBMITTED,

THE DEYON LAW GROUP, PLLC

/s/*Derek H. Deyon*

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CERTIFICATE OF SERVICE

I hereby certify that on January 31, 2020, a true and correct copy of the foregoing document was served on all counsel of record to:

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/s/*Derek H. Deyon*

_____

DEREK H. DEYON

CERTIFICATE OF COMPLIANCE

Appellant hereby certifies that this document contains approximately 1658 words and is under the maximum word count allowed by this court.

/s/*Derek H. Deyon*

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DEREK H. DEYON

APPENDIX

1. Majority Opinion in Appeal No. 01 – 18 – 00317 – CR

2. Dissenting Opinion in Appeal No. 01 – 18 – 00317 – CR

Opinion issued August 29, 2019

In The

Court of Appeals

For The

First District of Texas

NO. 01-18-00317-CR

WILBER ULISES MOLINA, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 338th District Court
Harris County, Texas
Trial Court Case No. 1433542

O P I N I O N

A jury found Wilber Ulises Molina guilty of aggravated sexual assault and assessed his punishment at 55 years of confinement. Molina appeals, contending:

(1) the trial court violated his constitutional right to confront the witnesses against him by allowing an analyst to testify based on DNA testing that was performed by others at an out-of-state laboratory;

(2) the evidence is legally insufficient to support his conviction because there is no admissible evidence that he sexually assaulted the complainant; and

(3) the prosecutor misstated the law and made improper and prejudicial statements about matters outside the record during closing arguments.

Finding no reversible error, we affirm.

BACKGROUND

In 2000, when the complainant was 23 years old, four men abducted her, at least three of whom then sexually assaulted her at gunpoint. She was blindfolded during the assaults.

More than one of the assailants ejaculated while sexually assaulting the complainant. To her knowledge, none of her assailants used a condom. Nor did any of the complainant's assailants make any effort to remove their semen from her or her clothing after they were done assaulting her.

The complainant's assailants abandoned her afterward. She then sought help and summoned law enforcement. A police officer took her to a hospital, where a nurse completed a sexual-assault kit and took the complainant's clothes, including her undergarments, to preserve any evidence of the assaults.

None of the complainant's assailants were identified for more than a decade and a half. In 2017, however, Molina voluntarily provided a cheek swab to the Houston Police Department for DNA analysis. A grand jury subsequently indicted Molina for aggravated sexual assault after a comparison of Molina's DNA profile

with a DNA profile generated from semen found in the complainant's undergarments matched. Molina pleaded not guilty.

At trial, the complainant testified that she would not be able to identify any of her abductors. No other witnesses could identify the complainant's abductors either. The DNA evidence was the sole link connecting Molina to the crime.

Motion to Exclude

Molina had moved to exclude the DNA evidence, contending that its introduction would violate his constitutional right to confront the witnesses against him. He argued that this was so because the complainant's undergarments were tested for DNA by an out-of-state laboratory and neither the analyst who performed the test nor any other employee from that out-of-state lab would be testifying. The trial court deferred its ruling pending the testimony of the state's expert.

Evidentiary Hearing

The state presented Lloyd Halsell, Operations Coordinator for the Houston Forensic Science Center, as its DNA expert. The trial court then held an evidentiary hearing about the DNA evidence outside the presence of the jury.

Halsell testified that the Houston laboratory did not process any DNA evidence in 2003 due to quality-assurance concerns. The sexual-assault kit at issue therefore was sent for processing to Reliagene, an independent laboratory in New Orleans. Reliagene processed the kit and issued a report of its findings the following

year. No one at the Houston Forensic Science Center independently processed this evidence. Nor did Halsell supervise Reliagene's processing of the sexual-assault kit.

Halsell explained that processing of the type performed by Reliagene in 2004 consists of physical examination of the evidence to determine if there is any biological material present, the extraction of any DNA from this material, and the application of techniques necessary to generate a profile from the DNA. The processing of evidence differs from its analysis, which entails examination of the data accumulated by processing to generate a DNA profile, if possible, that can then be used for comparison with profiles from other samples.

Halsell acknowledged that each laboratory has different standards and protocols, and that he did not know what standards and protocols Reliagene used. Halsell testified, however, that he knew Reliagene was accredited with respect to maintaining the proper quality-assurance standards. He also testified that the paperwork accompanying the processed evidence indicated that Reliagene had applied proper standards to preserve it from contamination and to maintain a proper chain of custody.

In 2017, the Houston Forensic Science Center received a cheek swab taken from Molina. The Center processed this swab for DNA.

Halsell then analyzed the underlying data generated by Reliagene in 2004 and the Center in 2017. He examined the data to ensure that it was adequate for

comparison. While Halsell reviewed and considered Reliagene's report, he testified that his report was not based solely on Reliagene's and that his analysis was independent of Reliagene's. Halsell stated that he reviewed the computer-generated data compiled by Reliagene and that his own report was based on this data. He relied on this computer-generated data in forming his expert opinion in this case.

Halsell opined that Reliagene's data was scientifically reliable. He based this opinion on Reliagene's paperwork, which documented that it had performed the steps that the Center uses to ensure reliability. His confidence in the reliability of the data was bolstered by his ability to independently analyze the data and generate a DNA profile. Halsell testified that the generation of a DNA profile would have been less likely—"we would not expect a profile to be generated"—if Reliagene had not gathered the underlying data in a scientifically reliable way.

After hearing Halsell's testimony, the trial court ruled that it was admissible. The trial court, however, excluded Reliagene's report.

Halsell's Trial Testimony

Halsell testified about the DNA evidence before the jury. He opined that, based on his comparison of the 2004 and 2017 DNA profiles, Molina could not be excluded as a possible contributor of the DNA in the complainant's undergarments. In other words, Molina's DNA profile matched the DNA profile obtained from the complainant's undergarments. As to the first sample obtained from her

undergarments, the probability that a random, unrelated Hispanic male would be included as a possible DNA contributor was 1 in 26 trillion. As to the second sample, the probability was 1 in 3.9 quadrillion. For reference, earth's population is about seven billion.

Jury Verdict

The jury found Molina guilty as charged. It assessed his punishment at 55 years' incarceration. The trial court entered a judgment of conviction in conformity with the jury's verdict.

DISCUSSION

I. Confrontation Clause

Molina contends that the trial court violated his constitutional right to confront the witnesses against him by allowing Halsell to testify based in part on the DNA testing performed by Reliagene, an independent, out-of-state laboratory.

A. Standard of review and applicable law

The Confrontation Clause of the Sixth Amendment to the United States Constitution gives a criminal defendant the right to cross-examine the witnesses against him. *See generally Crawford v. Washington*, 541 U.S. 36 (2004). Thus, testimonial statements of witnesses who do not take the stand at trial cannot be admitted into evidence unless the absent witness is both unavailable and the defendant had a prior opportunity to cross-examine the witness. *Id.* at 59.

But this constitutional rule of exclusion applies only to statements that are testimonial in nature; thus, whether an absent witness's statement is testimonial is a threshold issue for the court to decide. *See id.* at 68; *Woods v. State*, 152 S.W.3d 105, 113 (Tex. Crim. App. 2004). We review de novo a trial court's constitutional legal rulings, including whether an absent witness's statement is testimonial and thus barred from evidence. *Wall v. State*, 184 S.W.3d 730, 742 (Tex. Crim. App. 2006).

B. Analysis

The question before us is whether the Confrontation Clause bars a testifying expert from relying on computer-generated data gathered by employees of a different laboratory who processed physical evidence for DNA unless those employees also testify. Three decisions inform our analysis—*Williams v. Illinois*, 567 U.S. 50 (2012); *Paredes v. State*, 462 S.W.3d 510 (Tex. Crim. App. 2015); and *Garrett v. State*, 518 S.W.3d 546 (Tex. App.—Houston [1st Dist.] 2017, pet. ref'd). Based on these decisions, we hold that computer-generated DNA data from another lab is not testimonial, and the Confrontation Clause thus does not bar a testifying expert from relying on it even though the persons who accumulated the data do not take the stand and are not subject to cross-examination.

Williams v. Illinois

In *Williams*, the Supreme Court faced an issue very like the one before us. In a rape prosecution, the state's expert testified that a DNA profile produced by an

out-of-state laboratory matched a DNA profile produced by the state's crime lab using a blood sample from the defendant. 567 U.S. at 56, 59 (Alito, J., plurality op.). The expert relied on her own comparison of the two DNA profiles in opining that the defendant could not be excluded as a possible contributor. *Id.* at 61–62. The out-of-state lab's report was not admitted into evidence and the state's expert did not read from it on the stand or identify it as a source of her opinions. *Id.* at 62. The expert did not conduct or observe the work the out-of-state lab did to generate its DNA profile. *Id.* The defendant objected based on the Confrontation Clause. *Id.*

In a 5–4 decision, the Court rejected the defendant's constitutional challenge. But a majority of the Court did not agree on a rationale. Writing for himself and three others, Justice Alito concluded that the expert's reliance on another lab's DNA profile was not testimonial either because she merely informed the factfinder of the basis for her opinion, rather than vouching for the profile's accuracy, or because the other lab made the profile before the defendant was a suspect. *Id.* at 70–75, 81–84. Writing for herself and three others, Justice Kagan rejected both of these positions. *Id.* at 125–38 (Kagan, J., dissenting). Justice Thomas, writing for himself, agreed with the dissent's criticism of the plurality opinion, but nonetheless thought the out-of-state lab's DNA profile was not testimonial because its report containing the data on which the state's expert relied lacked the formality and solemnity necessary to render its contents testimonial. *Id.* at 103 (Thomas, J., concurring in the judgment).

As the Court of Criminal Appeals observed, the Supreme Court's decision in *Williams* is too fractured to serve as precedent. *See Paredes*, 462 S.W.3d at 516 (no rule can be derived from *Williams*); *see also Vasquez v. State*, 389 S.W.3d 361, 370 (Tex. Crim. App. 2012) (plurality opinions lack precedential value). *Williams* establishes only that the Supreme Court has yet to resolve the issue before us.

Paredes v. State

In *Paredes*, the Court of Criminal Appeals decided whether "the admission of a supervising DNA analyst's opinion regarding a DNA match" violates the Confrontation Clause "when that opinion is based upon computer-generated data obtained through batch DNA testing." 462 S.W.3d at 511. Under the circumstances before the Court, it held that the admission of this opinion was constitutional. *Id.*

Paredes involved a murder prosecution, in which the state's DNA expert was the director of the laboratory that tested the evidence. *Id.* at 512. Three different lab analysts processed the evidence for DNA. *Id.* The testifying expert had supervised their work and analyzed the resulting DNA profiles to ascertain whether there was a match. *Id.* She acknowledged that she did not actually watch the analysts perform their work even though she relied on their raw data. *Id.* at 512–13. She testified that had there been a problem with their work, her analysis would have produced no result, rather than producing an incorrect result. *Id.* at 512. None of the three analysts testified at trial. *Id.* at 513. Nor was their raw data admitted into evidence. *Id.*

Whether the expert wrote her own report was not clear from the record; however, if she did, it was not admitted into evidence either. *Id.* The defendant objected that he was constitutionally entitled to cross-examine the analysts. *Id.*

After discussing the Supreme Court's Confrontation Clause jurisprudence and its own decision in *Burch v. State*, 401 S.W.3d 634 (Tex. Crim. App. 2013), the Court of Criminal Appeals concluded that "several general principles are clear, assuming a defendant was afforded no prior opportunity to cross-examine." *Paredes*, 462 S.W.3d at 517. In summary, the Court observed that:

> (1) the Confrontation Clause renders inadmissible a lab report created solely by an analyst who does not testify at trial;
>
> (2) the Confrontation Clause likewise renders inadmissible expert testimony explaining a report solely created by a non-testifying analyst; and
>
> (3) an expert may testify based on DNA analysis performed by non-testifying analysts, but only to the extent of the expert's opinions and conclusions.

Id. at 517–18. With these general principles in mind, the Court held that the lab director's testimony was admissible because she "was more than a surrogate for a non-testifying analyst's report." *Id.* at 518.

In reaching its holding, the Court relied in significant part on the expert's independent analysis of computer-generated data, specifically the DNA profiles. *See id.* at 518–19. The Court held that prior decisions were distinguishable "because the testifying expert in this case relied upon raw, computer-generated data in reaching her conclusion rather than another laboratory analyst's report." *Id.* at 518. The expert

analyzed this computer-generated data, which was "the crucial analysis determining the DNA match" and she "testified to her own conclusions" rather than any conclusions made by the analysts. *Id.* Without her independent analysis of the DNA profiles, they stood "for nothing on their own." *Id.* at 519. The raw data on which the expert relied therefore was not testimonial in nature because it "did not come from a witness capable of being cross-examined" but "from a computer." *Id.*

The Court also noted that the analysts' lab reports that the expert relied on for the raw data were not admitted into evidence. *Id.* at 518. Thus, the expert was not a mere surrogate for otherwise inadmissible testimonial lab reports. *Id.*

The Court rejected the defendant's contention that the potential for human error—mishandling of samples or misreporting of results by the analysts—changed the constitutional calculus. *Id.* The lab director testified about the measures in place at the laboratory to detect errors. *Id.* Moreover, she testified that errors would have resulted in no DNA profile rather than an incorrect profile. *Id.*

Garrett v. State

In *Garrett*, this court rejected a defendant's contention that the trial court erred in admitting the testimony and report of a DNA analyst in violation of the Confrontation Clause. *See* 518 S.W.3d at 547. The defendant argued that admission of this evidence violated his right to confront the witnesses against him because two other analysts who processed the evidence for DNA did not testify. *Id.* at 547, 549.

Garrett involved a murder prosecution, in which the state's DNA expert testified based on his analysis of DNA profiles generated by two other analysts in the Houston Forensic Science Center. *See id.* at 548, 554. These analysts performed tests that ultimately resulted in computer-generated DNA profiles, which the testifying expert then analyzed to determine whether there was a DNA match. *Id.* at 555. The court therefore held that *Paredes* was dispositive because the expert "independently analyzed the raw DNA data and offered his own opinion concerning the comparison of the DNA profiles," notwithstanding the fact that the expert did not supervise the work of the two non-testifying analysts. *Id.* at 555–56.

Our Case

Molina contends that *Paredes* and *Garrett* are distinguishable because the experts in those cases at least testified about DNA that was processed in their own labs. In contrast, Molina argues, Halsell had no personal knowledge about the DNA data generated by Reliagene. Given Halsell's lack of personal knowledge about Reliagene's data and the absence of the Reliagene analyst who processed the evidence for DNA at trial, Molina maintains he had no means "to explore the types of misconduct and mistakes against which the Confrontation Clause was designed to protect."

We disagree. While neither *Paredes* nor *Garrett* involved situations in which an expert relied on data produced by analysts from another laboratory, both cases

are materially indistinguishable from this one in that the testifying experts in those cases opined based on their own independent analyses of computer-generated data derived by other analysts who actually processed some of the physical evidence for DNA. *See Paredes*, 462 S.W.3d at 518–19; *Garrett*, 518 S.W.3d at 555–56. *Parades* and *Garrett* hold that computer-generated DNA data is not testimonial and therefore is not subject to the Confrontation Clause's cross-examination requirement. *See Paredes*, 462 S.W.3d at 519; *Garrett*, 518 S.W.3d at 555. That the data was produced by analysts at a different laboratory does not render it testimonial in nature.

As in *Paredes* and *Garrett*, the state likewise did not offer into evidence any reports written or raw data compiled by a non-testifying analyst. *See Paredes*, 462 S.W.3d at 513, 518; *Garrett*, 518 S.W.3d at 554. Nor did Halsell act as surrogate for a non-testifying analyst's report by trying to explain the contents of this inadmissible evidence to the jury; instead, he offered his own opinions and conclusions based on his analysis of the underlying data. Halsell's testimony therefore conformed to the three general principles articulated by the Court of Criminal Appeals in *Paredes*. *See* 462 S.W.3d at 517–18.

Halsell's lack of personal knowledge as to Reliagene's laboratory practices does not alter the analysis. While the supervising analyst in *Paredes* was from the same lab and therefore familiar with its practices, "she did not physically watch each of the three analysts conduct the DNA testing process." *Id.* at 512–13, 518. Thus,

the supervising analyst in that case also lacked the personal knowledge necessary to testify as to whether the three analysts mishandled the evidence, made technical mistakes in processing the evidence, or engaged in scientific misconduct. She did, however, testify that if their work had been flawed, the tests would not have generated a DNA profile rather than generating an incorrect one. *Id.* at 512, 518.

Halsell's testimony was similar. He stated in part that he found Reliagene's computer-generated data to be reliable because he was able to generate a DNA profile based on his independent analysis of the data. If Reliagene had not gathered this data in a scientifically reliable manner, Halsell opined, "we would not expect a profile to be generated." Thus, like *Paredes*, this case "does not present the human-error problem" that Molina raises on appeal. *See Paredes*, 462 S.W.3d at 518.

We hold that the computer-generated data on which Halsell relied for his opinion was not testimonial in nature and that Molina's ability to cross-examine Halsell as to his analysis of the data therefore satisfied the Confrontation Clause.

II. Legal Sufficiency

Molina contends that the only evidence identifying him as one of the complainant's assailants is Halsell's testimony as to the DNA evidence. Since the Confrontation Clause bars that testimony, Molina reasons, there is not legally sufficient evidence of his guilt.

Having rejected Molina's confrontation claim, we also reject his legal-sufficiency challenge. Halsell testified that Molina could not be excluded as a possible contributor of the DNA recovered from the complainant's undergarments. Statistically, it was exceedingly improbable that the DNA was someone else's. Standing alone, Halsell's testimony is legally sufficient to prove beyond a reasonable doubt that Molina was one of the complainant's assailants under the circumstances of this case. *See King v. State*, 91 S.W.3d 375, 378–81 (Tex. App.—Texarkana 2002, pet. ref'd) (DNA evidence was sufficient to establish defendant's identity as rapist even without additional evidence of identity); *Roberson v. State*, 16 S.W.3d 156, 166–72 (Tex. App.—Austin 2000, pet. ref'd) (same); *see also Hinojosa v. State*, 4 S.W.3d 240, 245 (Tex. Crim. App. 1999) (DNA analysis showing probability of almost 1 in 20 million that semen found in body of woman who was raped and murdered came from someone other than defendant was impressive evidence supporting jury's guilty verdict).

Molina does not challenge the sufficiency of the evidence in any other respect. Accordingly, we hold that legally sufficient evidence supports the jury's determination that Molina sexually assaulted the complainant.

III. Closing Arguments

Molina contends that the trial court erred in overruling three objections his counsel made during the state's closing argument. The trial court should have

sustained these objections, Molina argues, because in the first instance the state misstated the law and in the second two instances the state introduced matters outside the record.

A. Standard of review and applicable law

We review a trial court's rulings on objections as to the proper scope of closing arguments for an abuse of discretion. *See Milton v. State*, 572 S.W.3d 234, 240 (Tex. Crim. App. 2019); *Vasquez v. State*, 484 S.W.3d 526, 531 (Tex. App.—Houston [1st Dist.] 2016, no pet.).

Counsel cannot argue contrary to the law, of course. *See Davis v. State*, 329 S.W.3d 798, 825 (Tex. Crim. App. 2010). But counsel are entitled to correctly argue the law, even if the law is not included in the jury charge. *State v. Renteria*, 977 S.W.2d 606, 608 (Tex. Crim. App. 1998); *Vasquez*, 484 S.W.3d at 531. As to the facts, while counsel are bound by the record, they are afforded wide latitude in argument and may draw all reasonable, fair, and legitimate inferences from the evidence. *Sterling v. State*, 830 S.W.2d 114, 120 (Tex. Crim. App. 1992); *Williams v. State*, 417 S.W.3d 162, 174 (Tex. App.—Houston [1st Dist.] 2013, pet. ref'd).

Improper jury argument is not a basis for reversal unless, when viewed in light of the record as a whole, it is extreme or manifestly improper, violates a mandatory statute, or injects new facts adverse to the defendant into the trial. *Borjan v. State*, 787 S.W.2d 53, 57 (Tex. Crim. App. 1990) (per curiam); *Stout v. State*, 426 S.W.3d

214, 220 (Tex. App.—Houston [1st Dist.] 2012, no pet.). Even then, an improper argument that is not constitutional in nature, such as one that misstates the facts, cannot serve as a basis for reversal unless it also affects the defendant's substantial rights. *Freeman v. State*, 340 S.W.3d 717, 728 (Tex. Crim. App. 2011).

An error affects a defendant's substantial rights if it has a substantial and injurious influence on the jury's verdict. *Coble v. State*, 330 S.W.3d 253, 280 (Tex. Crim. App. 2010). An error does not affect the defendant's substantial rights if the record as a whole shows that the error either did not influence the jury or influenced it only slightly. *Barshaw v. State*, 342 S.W.3d 91, 93 (Tex. Crim. App. 2011).

B. Analysis

1. Misstatement of the law

At trial, there was a dispute as to whether Molina went by the name Carlos, as one of the complainant's assailants referred to another of her abductors by this name. In closing, the state argued that this dispute did not create reasonable doubt about Molina's guilt. The state then asserted that the law did not require the complainant to testify that she saw Molina during the assault and could identify him or confirm that another of her attackers referred to Molina as Carlos. Defense counsel objected that this was "a misstatement of the law or the elements" that the state had to prove to secure a conviction.

Molina does not explain on appeal how the state misstated the law. We perceive no misstatement. Eyewitness identification is not required, and DNA evidence alone may establish an assailant's identity in a rape prosecution. *See, e.g.*, *Roberson*, 16 S.W.3d at 159 (affirming aggravated sexual assault conviction based on DNA even though complainant couldn't identify defendant and there was no other circumstantial evidence linking him to crime). The state correctly argued the law applicable to the case, which it was entitled to do. *See Renteria*, 977 S.W.2d at 608; *Vasquez*, 484 S.W.3d at 531. The trial court therefore did not abuse its discretion in overruling Molina's objection that the state misstated the law.

2. Misstatement of the facts

The state argued in closing that Reliagene did not conduct the DNA analysis of the evidence and that the analysis instead was made by Halsell. It further argued that Halsell's analysis resulted in a finding that the semen in the complainant's undergarments was Molina's "to 3.9 quadrillion odds." Defense counsel objected that both of these arguments misstated the facts.

Molina does not explain on appeal how these arguments misstate the evidence. The state's contention that Halsell analyzed the DNA evidence, rather than Reliagene, is consistent with Halsell's testimony distinguishing between Reliagene's processing of the physical evidence for DNA and his own analysis of the data derived from processing the evidence. The state's argument that Halsell performed

the DNA analysis was not outside the record, and the trial court thus did not abuse its discretion in overruling Molina's objection that the state misstated the facts. *See Sterling*, 830 S.W.2d at 120; *Williams*, 417 S.W.3d at 174.

The state's argument about the semen found in the complainant's undergarments, in contrast, was improper. The prosecutor argued that Halsell's analysis "found [Molina's] sperm to 3.9 quadrillion odds in her panties." While Halsell did calculate a probability of one in 3.9 quadrillion, the state misstated its significance. As a scientific treatise explains with respect to DNA evidence:

> The random-match probability is the probability that the suspect has the DNA genotype of the crime scene sample *if he is not the true source of that sample* (and is unrelated to the true source). The tendency to invert or transpose the probability—to go from a one-in-a-million chance *if the suspect is not the source* to a million-to-one chance that *the suspect is the source* is known as the fallacy of the transposed conditional.

David H. Kaye & George Sensabaugh, *Reference Guide on DNA Identification Evidence*, in REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 129, 168 (3d ed. 2011); *see also McDaniel v. Brown*, 558 U.S. 120, 128 (2010) (per curiam) (referring to fallacy of transposed conditional as "prosecutor's fallacy" and discussing same).

Statistically, this kind of transposition error is not a distinction without a difference. *See* Kaye & Sensabaugh, *supra*, at 168–69; *Wilson v. State*, 185 S.W.3d 481, 489 (Tex. Crim. App. 2006) (Johnson, J., concurring) (discussing erroneous transposition of probability statistics concerning DNA evidence). Thus, in the right

case, this error could constitute the injection of new—and mistaken—adverse facts that substantially affect the defendant's rights and thus require reversal.

We therefore must decide whether the state's misstatement of fact warrants reversal when viewed in the context of the present record. At the outset, we acknowledge that the state did not merely misstate the DNA evidence in passing. The prosecutor did so at length—without objection—earlier in his closing argument:

> We took her panties. And what did we find? Well, we found a sperm fraction from this defendant, 3.9 quadrillion, 3.9 quadrillion. I'm sure a lot of you probably have never even heard the number quadrillion before.
>
> I tried to explain a little with the DNA analyst. The earth has however many billions of people. Then when you saw him trying to write, that's a lot more zeroes. We're talking about more earths than you could ever even conceive of. And, again, that's the odds that you would just randomly—oh, the worst of luck, it is your DNA.
>
> Well, this defendant must have the worst luck in the entire—but you can't say world because I guess it would be about a million worlds. He's got the worst luck in about a million worlds that we would find his sperm in her panties.

In addition, the state's mischaracterization of Halsell's testimony in closing argument assumes particular significance in this case because the DNA evidence at issue was the sole evidence linking Molina to the charged offense.

The record also shows, however, that the state's mischaracterization of the DNA evidence did not impact the jury's verdict. During its deliberations, the jury requested that the court give it a transcript of Halsell's testimony explaining the 3.9 quadrillion statistic, which indicates that the jury had not yet decided what this

statistic proved. *See Moore v. State*, 658 S.W.2d 312, 315 (Tex. App.—Houston [1st Dist.] 1983, pet. ref'd) (jury note requesting information it thought relevant to its decision indicated that it had not formed an opinion on the matter). Without objection from the state or defense, the court gave the jury a four-page excerpt of Halsell's testimony on this subject. Thus, the prosecutor's argument was not the last word on the statistic; the jury had Halsell's actual testimony before it and did not simply rely on the state's misstatement. The jury's request and the trial court's response show that the state's misstatement of fact as to the DNA evidence did not substantially affect Molina's rights. *See id.* (trial court's instruction in response to jury note cured error); *see also Bargas v. State*, 252 S.W.3d 876, 902 (Tex. App.—Houston [14th Dist.] 2008, no pet.) (trial court's answer to jury note asking question about law omitted from charge rendered its omission from charge harmless); *Salinas v. State*, 652 S.W.2d 468, 469 (Tex. App.—Corpus Christi 1983, no pet.) (trial court's instruction to consider only evidence introduced at trial in response to jury note indicating that jury was considering matters outside the record cured any error).

Moreover, Molina does not contend on appeal that Halsell himself misstated the significance of the 3.9 quadrillion statistic. Halsell's testimony, properly understood, was powerful evidence connecting Molina to the crime. *See Hinojosa*, 4 S.W.3d at 245 ("Despite one in 19,900,000 odds, appellant's DNA profile matched the semen found in the complainant. Contrary to appellant's argument, these

impressive statistics support the jury's conclusion that appellant, as opposed to some unidentified 'suspect' also sharing the same DNA profile, sexually assaulted, kidnapped, and killed Wright."); *Roberson*, 16 S.W.3d at 167–68 (characterizing probability of 1 in 420 billion as "strong evidence"). Halsell testified that the probability that Molina had the same DNA profile recovered from the semen in the complainant's undergarments—but was neither the actual contributor of that semen nor related to the actual contributor—was one in 3.9 quadrillion. Based on Halsell's testimony, reasonable jurors could find that Molina was one of the complainant's assailants beyond a reasonable doubt. *See King*, 91 S.W.3d at 378–81; *Roberson*, 16 S.W.3d at 162.

We hold that the trial court abused its discretion by not sustaining Molina's objection to the state's improper jury argument, but that the state's improper jury argument and the trial court's erroneous ruling concerning it did not affect Molina's substantial rights and therefore are not reversible error. *See Freeman*, 340 S.W.3d at 728; *see also Barshaw*, 342 S.W.3d at 93; *Coble*, 330 S.W.3d at 280.

CONCLUSION

We affirm the judgment of the trial court.

Gordon Goodman
Justice

Panel consists of Chief Justice Radack and Justices Goodman and Countiss.

Justice Countiss, dissenting.

Publish. TEX. R. APP. P. 47.2(b).

Opinion issued August 29, 2019

In The

Court of Appeals

For The

First District of Texas

NO. 01-18-00317-CR

WILBER ULISES MOLINA, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 338th District Court
Harris County, Texas
Trial Court Case No. 1433542

DISSENTING OPINION

A jury found appellant, Wilber Ulises Molina, guilty of the felony offense of aggravated sexual assault[1] and assessed his punishment at confinement for fifty-five years. In his first and second issues, appellant contends that the evidence is legally

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1 *See* TEX. PENAL CODE ANN. § 22.021.

insufficient to support the appellant's conviction and the trial court erred in admitting certain testimony in violation of his constitutional right to confrontation.[2]

At trial, over appellant's objection, the trial court allowed a deoxyribonucleic acid ("DNA") analyst to testify based on DNA testing performed by others at an independent, out-of-state laboratory with which the analyst had no affiliation. In doing so, the trial court erroneously allowed DNA evidence to be admitted through a surrogate witness in violation of appellant's constitutional right to confrontation. The erroneously admitted DNA evidence was the only evidence admitted into the record linking appellant to the aggravated sexual assault of the complainant. Accordingly, I would hold that the evidence is legally insufficient to support appellant's conviction. Because the majority opinion holds that the trial court did not err in admitting the testimony of the DNA analyst in violation of the appellant's right to confrontation and that there is legally sufficient evidence to support appellant's conviction, I respectfully dissent.

Background

In 2003, the complainant was abducted by four men and sexually assaulted by at least three men at gunpoint. During those assaults, the complainant was

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[2] *See* U.S. CONST. AMEND. VI; TEX. CONST. art. 1, §10. In his third issue, appellant contends that the trial court erred in overruling his objection to certain portions of the state's closing argument. Due to my disposition of appellant's first and second issues, it is not necessary to address his third issue. *See* TEX. R. CIV. P. 47.1.

blindfolded and, therefore, unable to identify the men who abducted, sexually assaulted, and then abandoned her in a soccer field late at night. There were no other witnesses to the sexual assaults. As part of the law enforcement officers' investigation, a vaginal swab was taken from the complainant along with two "cuttings" from her underwear, believed to contain semen from some or all of her assaulters. This evidence was sent to ReliaGene Technologies, Inc. ("ReliaGene"), an independent laboratory outside of New Orleans, for processing of DNA evidence and a report.

Before trial, appellant moved to exclude the DNA evidence processed by ReliaGene, including a "Forensic Test Results" report from ReliaGene as well as any testimony by Lloyd Halsell III, a DNA analyst who did not perform the DNA testing for ReliaGene. Appellant asserted that use of the report and other evidence concerning the DNA testing performed by ReliaGene would violate his Sixth Amendment right to confrontation. The trial court held an evidentiary hearing on appellant's motion.

At the hearing, Halsell, an operations coordinator for the Houston Forensic Science Center ("HFSC"), who is trained in DNA analysis, testified that in 2003, when the complainant was sexually assaulted, the former Houston Police Department Crime Lab ("HPD Crime Lab") was not processing DNA evidence due to quality-assurance issues. Thus, the DNA evidence collected after the

complainant's 2003 sexual assaults was outsourced for processing to ReliaGene. After processing the kit, ReliaGene issued a "Forensic Test Results" report that it sent back to the former HPD Crime Lab.

Halsell further testified that, in 2017, HFSC received a DNA sample, also called "a reference," for appellant that it processed "in-house to generate a DNA profile" for appellant that could be compared to "the work that was done by Relia[G]ene." Notably, neither Halsell nor anyone else at HFSC tested the DNA evidence collected in 2003 following the aggravated sexual assault of the complainant. Instead, Halsell relied on unknown analysts at ReliaGene in ultimately concluding that appellant's 2017 DNA sample or "reference" matched the DNA evidence processed independently by ReliaGene in 2003. Halsell also explained that the "Forensic Test Results" report contained the "same data" as Halsell's own 2017 laboratory report, which states at the top: "previous analysis, Relia[G]ene Technology Laboratory." And although Halsell stated that he believed that his report was "independent from" the Relia[G]ene report, he specifically noted that his report was "based on the data that was used to generate" the ReliaGene "Forensic Test Results" report.

Regarding ReliaGene's procedures and protocols, Halsell testified that he "was not involved with the . . . physical processing of the [DNA] evidence" sent to ReliaGene in this case, he "never worked for Relia[G]ene," and he was "never a part

of the [DNA] testing of th[e] materials" at ReliaGene or otherwise. He further testified that his laboratory report was based on the data, DNA profile, and "Forensic Test Results" report generated independently by ReliaGene, although he had no knowledge of ReliaGene's standards and protocols, or how ReliaGene's DNA testing was actually performed, and he did not supervise anyone at ReliaGene who performed the DNA testing related to the complainant's 2003 aggravated sexual assault. Yet, when asked whether he could tell the trial court how ReliaGene's data was generated, Halsell responded:

> [W]ell, as I said, my review would have been a review of their case file. So, their extraction paperwork, their amplification paperwork, all of their controls, I was able to say that the data they obtained was reliable and sufficient that we can rely on it and use that data.

At the conclusion of the evidentiary hearing, the trial court excluded ReliaGene's "Forensic Test Results" report but it allowed Halsell to testify about *all* of the DNA evidence, including data and analysis from the excluded ReliaGene "Forensic Test Results" report. No witness from ReliaGene testified as to the DNA testing it performed in this case.

At trial, no witness from ReliaGene testified as to the processing or testing of the DNA evidence in this case. Instead, the State, through Halsell's testimony, introduced evidence about ReliaGene's DNA processing and testing about which Halsell previously admitted that he had no personal knowledge. For example,

Halsell testified regarding ReliaGene's process for testing the DNA evidence in this case as follows:

> So, the process there is they would—I don't know exactly how they were instructed, in terms of what items to look at. But they would have examined those items to then go through that process of what I was talking about to initially screen it and then go through those extractions and all of those steps to generate a DNA profile.

Halsell also testified that ReliaGene "worked the cases" that it received due to the issues with the former HPD Crime Lab "together" and "in batches." The HFSC would then "review[] the data off of the CDs" it received from ReliaGene. In other words, ReliaGene would have sent HFSC a "batch" of different DNA profiles from multiple different people related to different cases. And in regard to the DNA evidence in the instant case, when Halsell testified about the "chain of custody," he noted that the actual DNA evidence collected from the complainant would have been sent back to the former HPD Crime Lab from ReliaGene in a box that had two different cases with two different numbers. And when asked about the "sticky" note on the box that referenced other case numbers, Halsell responded that he did not "know what that note is referring to, whether it's referring to the evidence, [or] whether it's referring to reports. I have no knowledge of that note and really have not seen that before [that day at trial]."

Halsell further testified that despite "whatever happened with [the ReliaGene] lab in New Orleans in 2004," such as 'whether there was an error or not an error,

there was a DNA profile that was generated." However, he did not know "exactly how [ReliaGene DNA analysts] were instructed, in terms of what to look at," and he had "no personal knowledge . . . of th[e] process that was done" at ReliaGene. And Halsell confirmed that he had never worked at ReliaGene, he did not supervise anyone there, he did not see "any of the machines" there or "know [ReliaGene's] protocols and the[] steps that" were taken with respect to the processing and testing of the DNA evidence in the instant case.

Notably, despite Halsell's unfamiliarity with ReliaGene, its processes, procedures, protocols, personnel and chain-of-custody precautions, he based his report and testimony linking appellant to the 2003 aggravated sexual assault of the complainant on "the data that was generated by [ReliaGene's] laboratory," along with ReliaGene's "case file and all of their worksheets" and "computer data." Halsell confirmed that, assuming there was sufficient DNA evidence remaining after ReliaGene's testing, he could have re-tested the evidence himself—the screening, extraction and analysis—but he did not do so. Instead, he testified that based on the underwear "cuttings" that were independently processed by ReliaGene, "Wilber Molina was not excluded as a possible contributor to the DNA" found on the garmet. He further concluded that, from "the profile that [ReliaGene created and Halsell] observed on the evidence, that if [he] were to look randomly at the

population . . . [he] would expect that [he] would have to look at 3.9 quadrillion profiles to see that [same DNA] profile again."

Confrontation Clause

In his first issue, appellant argues that the trial court erred in admitting the testimony of Halsell based on DNA testing performed by others at an independent out-of-state laboratory with which Halsell had no affiliation because, by doing so, the trial court violated his right to confrontation. *See* U.S. CONST. Amend. VI; TEX. CONST. art. 1, § 10.

We review a trial court's decision to admit evidence for an abuse of discretion. *See Rodriguez v. State*, 203 S.W.3d 837, 841 (Tex. Crim. App. 2006). A trial court abuses its discretion if it acts arbitrarily, unreasonably, or without reference to any guiding rules or principles. *Montgomery v. State*, 810 S.W.2d 372, 380 (Tex. Crim. App. 1990). When considering a trial court's decision to admit evidence, we will not reverse the trial court's ruling unless it falls outside the "zone of reasonable disagreement." *Green v. State*, 934 S.W.2d 92, 102 (Tex. Crim. App. 1996) (internal quotations omitted).

A criminal defendant in the State of Texas has the right to be confronted with the witnesses against him. *See* U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."); TEX. CONST. art I, § 10 ("In all criminal prosecutions the

accused shall be . . . . confronted by the witnesses against him[.]"). The Confrontation Clause provides two types of protections for a criminal defendant: the right physically to face those who testify against him and the right to conduct cross-examination. *Pennsylvania v. Ritchie*, 480 U.S. 39, 51 (1987); *see also Crawford v. Washington*, 541 U.S. 36, 42 (2004); *Coy v. Iowa*, 487 U.S. 1012, 1016 (1988) (Confrontation Clause "guarantees [a] defendant a face-to-face meeting with witnesses appearing before the trier of fact"). And it bars admission of the testimonial statements of a witness who does not appear at trial unless the witness is unavailable to testify and the defendant has had a prior opportunity for cross-examination. *See Davis v. Washington*, 547 U.S. 813, 821 (2006) (citing *Crawford*, 541 U.S. at 53–54, (2004)). Whether a statement is testimonial or nontestimonial is a question of law that we review de novo. *Wall v. State*, 184 S.W.3d 730, 742 (Tex. Crim. App. 2006).

The United States Supreme Court has declined to provide a "comprehensive definition" of the term "testimonial." *Crawford*, 541 U.S. at 68. However, in *Crawford*, the landmark confrontation clause case, it explained that the confrontation clause applied "at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." *Id.* The Court further defined a core class of testimonial statements to include: (1) ex parte in-court testimony, (2) affidavits, (3) depositions, (4) confessions, (5) custodial

examinations, and (6) statements made under circumstances that would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *Id.* at 51–52.

Subsequent cases from the United States Supreme Court have continued to explore what types of statements are considered "testimonial" in nature. In *Melendez-Diaz v. Massachusetts*, the Supreme Court made clear that *Crawford's* rule reaches forensic evidence, which is not "uniquely immune from the risk of manipulation." 557 U.S. 305, 318 (2009). There, the Court held that admitting certain notarized "certificates of analysis" showing the result of forensic testing and stating that the substances seized from the criminal defendant contained cocaine, without requiring any testimony from the analysts who performed the testing, violated the defendant's right to confrontation. *See id.* at 309–311. As the Court explained, "certificates of analysis" had a clear evidentiary purpose, were made under circumstances which would lead an objective witness reasonably to believe that the "certificates of analysis" would be available for use at a later trial, and, thus, they "f[ell] within the Clause's 'core class of testimonial statements.'" *Id.* at 310–311 (quoting *Crawford*, 541 U.S. at 51–52). Further, the Court rejected the argument that the Confrontation Clause should not apply to bar the admission of the "certificates of analysis" because the "statements" in the certificates resulted from "neutral scientific testing," making them presumptively reliable. *Id.* at 318.

According to the Court, the Confrontation Clause requires reliability to be assessed in a "particular manner," namely, through "testing in the crucible of cross-examination." *Id*. at 317 (quoting *Crawford*, 541 U.S. at 61).

Then, in *Bullcoming v. New Mexico*, the Supreme Court held that a forensic laboratory report was also testimonial and that the testimony explaining the report from a witness who did not personally perform the forensic testing detailed in the report violated the criminal defendant's right to confrontation. 564 U.S. 647, 652 (2011). In that case, the state, at trial, introduced the results of the criminal defendant's blood alcohol testing through an analyst who was familiar with the testing laboratory's procedures, but who had not participated in and had not observed the forensic testing of the defendant's blood sample. *Id*. at 651. On appeal, the question presented to the Court was "whether the Confrontation Clause permitt[ed] the [state] to introduce a forensic laboratory report containing a testimonial certification—made for the purpose of proving a particular fact—through the in-court testimony of a scientist who did not sign the certification or perform or observe the test reported in the certification." *Id*. at 652. Significantly, the Court determined that the State's resort to the use of a "surrogate" witness, in place of the analyst who created the forensic laboratory report, did not satisfy the Confrontation Clause. *Id.* And, the criminal defendant had a "right . . . to be confronted with the analyst who [completed the testing], unless that analyst [was] unavailable at trial,

and the [defendant] had an opportunity, pretrial, to cross-examine that particular scientist." *Id.*

Most recently, in *Williams v. Illinois*, the Supreme Court issued a plurality opinion, regarding certain testimony concerning DNA evidence in circumstances similar to the ones present in this case. *See* 567 U.S. 50, 55–141 (2012). At the very least, the Court's struggle to resolve the same issue we face in this case confirms the seriousness of the matters at stake.

In *Williams*, the complainant "was abducted while she was walking home from work." *Id.* at 59. The perpetrator then sexually assaulted her, robbed her, and left her "in[] the street." *Id.* At the hospital, doctors "took a blood sample and vaginal swabs." *Id.* In linking the criminal defendant to the sexual assault of the complainant, the State relied on a "DNA profile produced by an outside laboratory." *Id.* at 56. Specifically, the State called a witness to testify about the DNA generated by another laboratory at which the witness did not work or ever "set foot" inside. *Id.* at 56, 60–62; *see also id.* at 125 (Kagan, J., dissenting). The witness also revealed that she did not conduct or observe any of the forensic testing that created the DNA profile, which she then "matched" to the criminal defendant. *Id.* at 62.

Significantly, four of the Justices dissented in *Williams*, concluding that the testimony at issue constituted "surrogate testimony" like the testimony of the witness who did not actually perform the forensic testing in *Bullcoming*, and should have

been excluded for a violation of the criminal defendant's right to confrontation. *See id.* at 118–141 (Kagan, J., dissenting). Writing for the dissent, Justice Kagan explained the dangers of allowing evidence of a forensic laboratory report to come in through a "surrogate witness" because the witness "could not convey what [the actual analyst who completed the testing of the DNA evidence] knew or observed about the events . . . , i.e., the particular test and testing process he employed," "[n]or could such surrogate testimony expose any lapses or lies" on the forensic testing analyst's part. *Id.* at 124 (Kagan, J., dissenting) (first and second alterations in original) (emphasis omitted). "Like the lawyers in *Melendez-Diaz* and *Bullcoming*, Williams's attorney could not ask questions about that analyst's proficiency, the care he took in performing his work, and his veracity." *Id.* at 123 (Kagan, J., dissenting) (internal quotations omitted). Importantly, "[h]e could not probe whether the analyst had tested the wrong vial, inverted the labels on the samples, committed some more technical error, or simply made up the results." *Id.* at 125 (Kagan, J., dissenting). The dissenting Justices noted that "[a]t least the surrogate witness in *Bullcoming* worked at the relevant laboratory and was familiar with its procedures," which was not true for the surrogate witness in *Williams*. *Id.* (Kagan, J., dissenting).

Significantly, the dissent reiterated, as the Supreme Court had emphasized in *Melendez-Diaz*, that "in response to claims of the *über alles* reliability of scientific evidence: [i]t is not up to [the court] to decide, *ex ante*, what evidence is trustworthy

and what is not" because "the Confrontation Clause prescribes its own 'procedure for determining the reliability of testimony in criminal trials,'" namely, "cross-examination." *Id.* at 138 (quoting *Crawford*, 541 U.S. at 67). Dispensing with cross-examination "because testimony is obviously reliable is akin to dispensing with jury trial because a [criminal] defendant is obviously guilty." *Id.* (quoting *Crawford*, 541 U.S. at 67). This should not be a stance supported by the Court.

The United States Supreme Court is not the only court to address a criminal defendant's right to confrontation in circumstances similar to the instant case. Most notably, in *Burch v. State*, the Texas Court of Criminal Appeals, relying on the Supreme Court's analysis in *Bullcoming*, disapproved of the admission of a laboratory report without the criminal defendant being able to cross-examine the analyst who tested a substance contained in a ziplock bag found on the defendant. 401 S.W. 3d 634, 640 (Tex. Crim. App. App. 2013). Instead, the State offered as its witness an analyst who did not do any "testing," but simply "review[ed]" the work done. *Id.* at 635–36. On appeal, the Dallas Court of Appeals held that the trial court erred in admitting the laboratory report and the "reviewer" analyst's testimony that the substance found on the criminal defendant was cocaine. *Id.* And the Texas Court of Criminal Appeals agreed, noting that although "the testifying witness[, the reviewing analyst,] was a supervisor who 'reviewed' the original process, [the Court

could not] say, on th[e] record, that [the witness] had personal knowledge that the tests were done correctly or that the tester did not fabricate the results." *Id.* at 637. Accordingly, it was error to admit the laboratory report, which contained testimonial statements, and the reviewing analyst's testimony about the results of testing that she did not complete and who could not verify the authenticity of the statements. *Id.* Stated differently, the Court held that the admission of the laboratory report and the reviewing analyst's testimony violated the criminal defendant's right to confrontation. *Id.* at 637–38 ("Without having the testimony of the analyst who actually performed the tests, or at least one who observed their execution, the defendant has no way to explore the types of corruption and missteps the Confrontation Clause was designed to protect against."). As the Court explained, the "State cannot sidestep the Sixth Amendment" by creative wordsmithing. *Id.* at 639.

In an about-face two years later, the Court in *Paredes v. State*, when faced with the same Confrontation Clause dilemma as in *Burch*, determined that the criminal defendant's right to confrontation was not violated. *See* 462 S.W. 3d 510, 519 (Tex. Crim. App. 2015). Inexplicably, the Court distinguished *Paredes* from *Burch*, on the basis that the State, in *Burch*, "called the testing analyst's supervisor who signed the lab report but had not performed or observed any testing." *Id.* at 518. In other words, the laboratory reports admitted into evidence in *Burch*

contained testimonial statements that were admitted "through the expert testimony of a [surrogate witness] who did not make th[e] statements and could not verify the authenticity of th[e] statements." *Id.* In contrast, according to the Court, in *Paredes*, the testifying witness was a supervisor in the laboratory where the forensic testing took place, she "performed the crucial analysis determining the DNA match," she "testified to her own conclusions," she "testified about the safety measures in place" at the lab to detect errors and the laboratory reports she relied on to reach her conclusions "were not offered into evidence." *Id.* at 512, 518. Further, because the witness relied on "non-testimonial information—computer-generated DNA data—to form [her] independent, testimonial opinion and [the defendant] was given the opportunity to cross-examine her about her analysis," the Court held that the testifying witness in *Paredes* was "more than a surrogate for a non-testifying analyst's report." *Id.* at 518–19.

Here, the majority opinion errs in relying on *Paredes* and in extending its holding to apply to the facts of this case. In *Paredes*, the Court could not have reached its conclusion but for the other factors weighing in favor of the testifying witness's reliability. As the Court clearly explained, "more importantly, [the witness] testified about the safety measures in place at [the laboratory] to detect . . . errors and stated that, if part of the analysis were done improperly, the

laboratory procedure would not generate an incorrect DNA profile."[3] *Id.* In other words, the testifying witness in *Paredes* had a distinct level of first-hand knowledge due to working in the same laboratory as the other analysts who participated in generating the inculpatory DNA profile. And she was testifying as "*more than* a surrogate" because she actually performed "the crucial analysis" and merely relied on another analyst's "computer-generated data in reaching her conclusion rather than another analyst's report." *Id.* (emphasis added) (explaining "not a case in which the State attempted to bring in a testimonial lab report through a surrogate [witness]"); *see also Garret v. State*, 518 S.W. 3d 546, 554–55 (Tex. App.—Houston [1st Dist.] 2017) (testifying analyst performed analysis and comparison of criminal defendant's DNA profile and DNA profile obtained from scene; all testing and analysis took place at HFSC laboratory; testifying analyst testified about work completed by other analysts in laboratory where he also worked but also that he performed actual analysis and interpretation leading to his laboratory report confirming results).

Not so here. In our case, Halsell had no personal knowledge about ReliaGene's analysts or their processes and procedures, although he was allowed to testify as if he did. And, contrary to the testifying witness in *Paredes*, it is undisputed that Halsell did not just rely on raw computer-generated data from ReliaGene in

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[3] Instead, the forensic DNA testing would have "yield[ed] no result at all[,] rather than an improper result." *Paredes v. State*, 462 S.W.3d 510, 518 (Tex. Crim. App. 2015).

order to reach his conclusion which linked appellant to the complainant's 2003 aggravated sexual assault in this case. Instead, he testified unequivocally that he relied on "[n]ot only . . . [ReliaGene's "Forensic Test Results"] report, but . . . also . . . the data that was generated by [ReliaGene's] laboratory." Halsell explained that he took ReliaGene's "case file," "worksheets," and "computer data" to perform his analysis. And the unknown analyst at ReliaGene "extracted, quantified, amplified, did all these steps in the process in order to create a DNA profile" that Halsell then "used as part of [his] analysis." Halsell's conclusions are dependent on more than just ReliaGene's "computer-generated data." His conclusions are dependent on a non-testifying analyst's report and testimonial statements.

The majority opinion seizes on the language in *Paredes*,[4] that "computer[-]generated DNA data is not testimonial" and "is not subject to the Confrontation Clause's cross-examination requirement" to justify its holding. *See Paredes*, 462 S.W.3d at 518–19. In doing so, the majority opinion ignores a significant portion of the Court of Criminal Appeals' reasoning in *Paredes*, namely that the testifying witness "did not introduce or testify regarding a formal report or

[4] The same language is found in our previous opinion in *Garrett v. State*, 518 S.W.3d 546, 555 (Tex. App.—Houston [1st Dist.] 2017, pet. ref'd) ("The raw DNA profiles 'are not the functional equivalent of live, in-court testimony because they did not come from a witness capable of being cross-examined. They com from a computer.'" (quoting *Paredes*, 462 S.W.3d at 518)).

assertion from a non-testifying analyst." *Id.* at 519. Accordingly, the majority opinion is incorrect in stating that the DNA evidence at issue in this instant case is merely "computer-generated data on which Halsell relied for his opinion" and, thus, not testimonial and does not violate appellant's right to confrontation. This conclusion is completely contrary to Halsell's own testimony that, in reaching his opinion, he relied on the analysis and "Forensic Test Results" report issued by ReliaGene and about which he had no knowledge.

Scarier yet, Halsell's testimony in this case lacks any assurances of reliability that existed in *Paredes*. For instance, we do not know how that "raw computer-generated data" the majority opinion finds so compelling was obtained because there was no one available for appellant to cross-examine or confront.[5] And when the State introduced the substance of ReliaGene's "Forensic Test Results" report into evidence through Halsell's testimony, the analyst who actually tested the

[5] This problem is apparent due to the jury's confusion surrounding Halsell's testimony. During deliberations, the jury requested "the documentation of the evidence of the DNA." The jurors's disagreement over the "DNA numbers" led them to request "the testimony of the DNA expert on the analysis of the DNA."

DNA evidence and generated that report became a witness, just like Halsell.[6] Accordingly, appellant had the right to confront that ReliaGene analyst, too.[7]

To be sure, the record in this case—Halsell's own testimony—contradicts the majority opinion's skewed depiction of this case. Here, we are faced with the same

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[6] There is no basis for admitting Halsell's testimony concerning ReliaGene's "Forensic Test Results" report and analysis on a basis other than for the truth of the matter asserted. As summarized in Justice Kagan's dissent in *Williams v. Illinois*:

> The plurality's primary argument to the contrary tries to exploit a limit to the Confrontation Clause recognized in Crawford. "The Clause," we cautioned there, "does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted." The Illinois Supreme Court relied on that statement in concluding that [the surrogate witness's] testimony was permissible. On that Court's view, "[the surrogate witness] disclosed the underlying facts from [the outside laboratory's] report" not for their truth, but "for the limited purpose of explaining the basis for her [expert] opinion," so that the factfinder could assess that opinion's value. The plurality wraps itself in that holding, similarly asserting that [the surrogate witness's] recitation of [the outside laboratory's] findings, when viewed through the prism of state evidence law, was not introduced to establish "the truth of any . . . matter concerning [the outside laboratory's]" report. But five Justices agree, in two opinions reciting the same reasons, that this argument has no merit: [the surrogate witness's] statements about [the outside laboratory's] report went to its truth, and the State could not rely on her status as an expert to circumvent the Confrontation Clause's requirements.

567 U.S. at 125–26 (Kagan, J., dissenting) (internal citations omitted).

[7] As if that weren't enough, at the time the DNA evidence was outsourced to ReliaGene in 2003, the former HPD Crime Lab had been shut down for failure to meet quality standards. Halsell testified about the doubt surrounding the quality of work being generated at the HPD Crime Lab and the questions about the integrity of storage of evidence there. Why, under these circumstances, would the State, in a cold case based solely on DNA evidence, be allowed to use a "surrogate witness" for the most critical evidence linking appellant to the sexual assault of the complainant? *Cold Case,* BLACK'S LAW DICTIONARY (11th ed. 2019).

circumstances as in *Bullcoming* and *Burch*. Halsell is not "more than a surrogate," he is *actually a surrogate* for a non-testifying analyst's testimonial statements and forensic report and the majority errs in holding otherwise. *See Bullcoming*, 564 U.S. at 661–65 ("[T]his violated the Confrontation Clause because the testing analyst's laboratory report was testimonial and it could not be admitted into evidence through the 'surrogate testimony' of another analyst." (internal citations omitted)); *Burch*, 401 S.W.3d at 640 ("Although the State did call the reviewing analyst at trial, that witness did not have personal knowledge of the testimonial facts being submitted. Consequently, she was not an appropriate surrogate witness for cross-examination."). Further, the fact that the trial court excluded ReliaGene's "Forensic Test Results" report is immaterial because Halsell made it clear that his testimony and his own report and conclusions were reliant upon ReliaGene's independently generated work product—not merely raw computer-generated data. Halsell did not limit his testimony to confirming that the two DNA profiles matched each other. Rather, Halsell testified that ReliaGene took certain steps and used certain processes to generate a DNA profile from the DNA evidence provided to it. He certified that the analysis performed by an unknown ReliaGene analyst was accurate despite his admitted lack of personal knowledge of ReliaGene's procedures and processes.

"Scientific testing is 'technical,' to be sure . . . , but it is only as reliable as the people who perform it." *Williams*, 567 U.S. at 137 (Kagan, J., dissenting). "That is why a defendant may wish to ask the analyst a variety of questions: How much experience do you have? Have you ever made mistakes in the past? Did you test the right sample? Use the right Procedures? Contaminate the sample in any way?" *Id.* (Kagan, J., dissenting).

As the Supreme Court has frequently said, the criminal defendant's right to confrontation "[i]s a fundamental right essential to a fair trial." *Pointer v. Texas*, 380 U.S. 400, 404 (1965). And courts must be willing to act zealously to protect the right from erosion. *Greene v. McElroy*, 360 U.S. 474, 496–97 (1959); *see also Barber v. Page*, 390 U.S. 719, 725 (1968) ("The right of confrontation may not be dispensed with so lightly."). When the right to confrontation is denied or significantly diminished, "the ultimate integrity of the fact-finding process" is called into question. *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973) (internal quotations omitted); *see also Pointer*, 380 U.S. at 404 (right of confrontation necessary to "expos[e] falsehoods and bring[] out the truth in the trial of a criminal case").

For these reasons, I would hold that the trial court erred in admitting the testimony of Halsell regarding the DNA evidence in this case because, by doing so, the trial court violated appellant's right to confrontation. I would further hold that

the erroneous admission of Halsell's testimony harmed appellant. *See* TEX. R. APP. P. 44.2(a). And I would sustain appellant's first issue.

Sufficiency of the Evidence

In his second issue, appellant argues that the evidence was legally insufficient to support his conviction because there is "a complete lack of evidence, other than the improperly admitted testimony of . . . Halsell . . . to connect [a]ppellant to the . . . [aggravated] sexual assault of [the complainant]."

We review the legal sufficiency of the evidence by considering all the evidence in the light most favorable to the jury's verdict to determine whether any "rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 318–19 (1979); *Williams v. State*, 235 S.W.3d 742, 750 (Tex. Crim. App. 2007). Our role is that of a due process safeguard, ensuring only the rationality of the trier of fact's finding of the essential elements of the offense beyond a reasonable doubt. *See Moreno v. State*, 755 S.W.2d 866, 867 (Tex. Crim. App. 1988). We give deference to the responsibility of the fact finder to fairly resolve conflicts in testimony, weigh evidence, and draw reasonable inferences from the facts. *Williams*, 235 S.W.3d at 750. However, our duty requires us to "ensure that the evidence presented actually supports a conclusion that the defendant committed" the criminal offense of which he is accused. *Id.*

A person commits the offense of aggravated sexual assault if he intentionally or knowingly causes the sexual organ of another person, without that person's consent, to contact the sexual organ of another person, including him, and he uses or exhibits a deadly weapon in the course of the same criminal episode. TEX. PENAL CODE ANN. § 22.021(a)(1)(A)(iii), (a)(2)(A)(iv). In this case, the only evidence presented at trial linking appellant to the aggravated sexual assault of the complainant was the erroneously admitted testimony of Halsell at trial. Without the DNA evidence from Halsell indicating that appellant could not be excluded as a DNA contributor in this case, the jury would only have heard the testimony of the complainant and two other witnesses—none of whom were able to identify appellant as the perpetrator of the aggravated sexual assault. *Cf. Jensen v. State*, 66 S.W.3d 528, 534 (Tex. App.—Houston [14th Dist.] 2002, pet. ref'd) (holding complainant's testimony defendant was person who sexually assaulted her sufficient to support conviction).

Thus, viewing the evidence in the light most favorable to the jury verdict, a rational juror could not conclude, beyond a reasonable doubt, that appellant committed the offense of aggravated sexual assault. *See* TEX. PENAL CODE ANN. § 22.021(a)(1)(A)(iii), (a)(2)(A)(iv); *Jackson*, 443 U.S. at 318–19; *Williams*, 235 S.W.3d at 750. And I would hold that there is legally insufficient evidence to support appellant's conviction and sustain appellant's second issue.

Accordingly, I would reverse the judgment of the trial court and render a judgment of acquittal. *See Verduzco v. State*, 24 S.W.3d 384, 386 (Tex. App.—Houston [1st Dist.] 2000, no pet.). Because the majority opinion does not, I respectfully dissent.

Julie Countiss
Justice

Panel consists of Chief Justice Radack and Justices Goodman and Countiss.

Countiss, J., dissenting.

Publish. TEX. R. APP. P. 47.2(b).